IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1024 OF 2005
WITH
CIVIL APPLICATION NO.1222 OF 2005
WITH
APPEAL FROM ORDER NO.1025 OF 2005
WITH
CIVIL APPLICATION NO.1223 OF 2005

Babu Rasul Mujawar. ..Appellant.

V/s.

Sadashiv Govind Hazare & Ors. ..Respondents.

Mr.Sandesh Patil & Sandesh More for appellant.

Mr.M.S.Lagu with R.S.Apte for respondent Nos.1 to 4.

CORAM: A.M.KHANWILKAR,J

DATE : JUNE 6, 2006.

P.C. :

1. Heard counsel for the parties.

2. Admit.

3. Mr.Lagu waives notice for respondents.

4. As short question is involved, appeals are heard forthwith for final disposal by consent.

5. These appeals question the correctness of the Judgment and Order passed by the Appellate Court

dated 27th August, 2005 in Regular Civil Appeal Nos.101 of 2001 and 159 of 2003 respectively. Both these appeals have been disposed of by common Judgment.

6. Briefly stated, the respondent No.1 is the owner in respect of the suit land. A Mortgage deed was executed some time in 1968 with regard to the suit land in favour of the appellant. While the said Mortgage deed was subsisting, agreement to sell the said land came to be executed in favour of the appellant in the year 1975. Later on, on 23rd September, 1996, the respondent owner filed suit for redemption of mortgage deed being R.C.S.No.275/96. During the pendency of the said suit, the appellant filed suit for specific performance being R.C.S.No. 97 of 1997. By Judgment and order dated 1st February, 2001 suit preferred by the appellant which was in subsequent point of time for relief of specific performance was finally disposed of and decreed in favour of the appellant, whereas the suit filed by the respondent land owner came to be finally decided and dismissed by the Judgment and decree dated 10th July, 2003. Both these decisions were made subject matter of two separate appeals preferred before the District Judge, Sangli. The Appellate

Court proceeded to hear both the appeals together as it involved overlapping issues between the same parties. The Appellate Court by the impugned Judgment and Order however, chose to set aside Judgment and Decree passed by the Trial Court and remanded the suits to the file of the Trial Court for being decided afresh on its own merits in accordance with the law. The primary and singular reason which has weighed the appellate Court for remanding the suits to the file of the Trial court is that the suit filed by the respondent for redemption of mortgage being in earlier point of time should have been decided first; whereas the suit filed by the appellant came to be decided in earlier point of time. The Appellate Court in substance took the view that the Civil Court ought to have stayed the proceeding of the suit filed by the appellant till final decision of the suit preferred by the respondents in terms of rigours of section 10 of the Civil Procedure Code. This decision is subject matter of challenge in the present appeal.

7. According to the appellant herein, the Appellate Court has completely misdirected itself in invoking provisions of Section 10 of Code of Civil Procedure. On the other hand, the trial Court was

right in deciding the suit for specific performance in earlier point of time because the only remedy to the land owner is to file suit for completion of the contract. In other words, the provision of section 10 of the Civil Procedure Code will be of no avail to the fact situation of the present case. To buttress this submission, reliance is placed on the decision of the Apex Court in the case of **Hamzabi & Ors. V/s. Syed Karimuddin & Ors. reported 2001(1) Mh.L.J page 678,** in particular, the exposition in paragraph-7 of the said decision.

8. Counsel for the respondent-owner however, contends that no fault can be found with the approach of the Appellate Court. In any case, both the suits will now be considered together by the Trial court in view of the remand order. As such, no prejudice will be caused to the parties, if such course is adopted in terms of the remand order passed by the Appellate Court.

9. Having considered the rival submissions, in my opinion, the appellant is right in contending that the Appellate Court misdirected itself in invoking the provisions of section 10 of the Civil Procedure Code to the fact situation of the present case. The

legal position has been articulated in the decision of the Apex Court in **Hamzabi(supra)** which is pressed into service on behalf of the appellant. In paragraph-7 of the said decision after referring to the decision of the Apex Court in the case of **Narandas Karsondas Vs.S.A.Kamtam reported in AIR 1977 SC 774,** it is observed as follows:

> "7. This Court Narandas Karsondas vs. S.A.Kamtam(supra) was not called upon to decide whether the equity of redemption could also be extinguished by part-performance of a contract of sale under section 53-A. When a mortgagor/vendee agrees to sell the mortgaged property to the mortgagee/putative vendee in possession, the mortgagee's status is subsumed or merged in his rights as a putative vendee under section 53-A against the transferor, provided of course the preconditions for the application of section 53-A are fulfilled. Given the mandatory language of section 53-A, it must be held that in such a situation the equity of redemption in the mortgagor/vendee is lost to the extent that the mortgagor cannot reclaim possession of the mortgaged property. To hold to the contrary, would not only defeat the mandate of section 53-A but would result in an anomalous situation. An owner who may not have mortgaged his property cannot be in a worse position vis-a-vis the vendee than an owner who may have mortgaged the subject-matter of sale to the vendee. The only right left with the owner in both cases is to sue for the completion of the contract.

10. What is relevant for our purpose is the legal position stated in this decision that when a mortgagor/vendee agrees to sell the mortgaged property to the mortgagee/putative vendee in

possession, the mortgagee's status is subsumed or merged in his rights as a putative vendee under section 53-A of the Transfer of Property Act against the transferor, provided of course the preconditions for the application of section 53-A are fulfilled. According to the appellant, this aspect ought to have been considered by the Appellate Court itself. Besides, the appellant has rightly pressed into service the exposition in paragraph-7 of the decision of the Apex Court as extracted above that the only right left with the owner is to sue for the completion of contract. In other words, the case of the appellant is that the remedy of redemption of mortgage is unavailable to the respondent land owner in the fact situation of the present case. Be that as it may, all these questions can be answered by the Appellate Court on the basis of materials already on record, for which purpose, it was not necessary to remand both the matters to the trial Court for reconsideration de novo. This submission commends to me.

11. The counsel for the respondents relying on the observation in paragraph-7 of the decision of the Apex court referred to above would however, contend that the right to be accrued to the vendee is a

qualified right, as is observed by the Apex Court. In other words, it is argued that the mortgagee/putative vendee will have to establish that the preconditions of section 53A of the Transfer of Property Act have been fulfilled. As is mentioned earlier, all these aspects though relevant will have to be addressed by the Appellate Court itself on the basis of materials on record in terms of the view expressed by the Apex court referred to above.

12. Viewed thus, there was no necessity to remand the case to the Trial Court or to relegate the parties before the Trial Court. To that extent grievance of the appellant is justified. Accordingly, impugned Judgment and order will have to be set aside and instead the appeals will have to be restored to the file of Appellate Court to be decided on its own merit in accordance with the law keeping in mind the legal position stated by the Apex Court in the case of **Hamzabi(Supra),** which is already referred to in the earlier part of this Judgment.

13. It is made clear that all questions regarding the merits of the appeals which are restored to the file of the Appellate Court are left open, to be dealt with in accordance with the law.

14. These appeals are allowed on the above terms with no order as to costs. Civil applications in the respective appeals are disposed of accordingly.

15. Parties shall appear before the Appellate Court on 10th July, 2006, on which date the Appellate Court will proceed to fix appeals for hearing by assigning appropriate date, so as to ensure that the Appeals are disposed of expeditiously preferably by end of December, 2006.